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In the Supreme Court of the United States

OCTOBER TERM, 1956

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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OCTOBER 1956.

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JURISDICTIONAL STATEMENT

The Interstate Commerce Commission (hereinafter called "the Commission") submits this statement to show that this Court has jurisdiction on appeal from the judgment of the United States District Court for the Northern District of Illinois, entered June 14, 1956, setting aside and enjoining enforcement of an order of the Commission, and that substantial questions are presented by the appeal.

OPINIONS BELOW

The opinion of the three-judge district court for the Northern District of Illinois is not yet reported,

but is reproduced in Appendix A hereto. The judgment of the district court is set forth in Appendix B. The report of the Commission which gave rise to the order set aside and enjoined by the district court is reported at 297 I. C. C. 353, and is set forth as Appendix C to the Jurisdictional Statement heretofore filed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company in No. 307.

JURISDICTION

This suit was brought under 28 U. S. C. 1336, to set aside and enjoin enforcement of an order of the Commission. The judgment of the district court was entered on June 14, 1956, and the Commission's notice of appeal was filed in the district court on August 13, 1956.

The jurisdiction of the Supreme Court to review the district court's decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *King* v. *United States*, 344 U. S. 254; *American Trucking Assns.* v. *United States*, 344 U. S. 298; *Frozen Food Express* v. *United States*, 351 U. S. 40.

STATUTES INVOLVED

Involved in this appeal are sections 13 (3) and (4) of the Interstate Commerce Act, 49 U. S. C. 13 (3) and (4), which are set forth in Appendix C hereto.

QUESTIONS PRESENTED

(1) Whether the Interstate Commerce Commission, in directing increases in intrastate passenger fares

pursuant to section 13 (4) of the Interstate Commerce Act, in order to eliminate unjust discrimination against interstate commerce, is precluded from relying upon evidence which had not been introduced at a prior proceeding before the state regulatory commission in which the latter had refused to increase the intrastate fares.

(2) Whether the district court, in setting aside the Commission's order directing increases in intrastate fares, erred in also setting aside an order which authorized increases in interstate fares.

(3) Whether the district court erred in setting aside the Commission's orders increasing both the interstate and intrastate suburban fares because of the absence of a finding as to what contribution from the intrastate suburban traffic would constitute a fair proportion of the railroad's total income, the Commission having found that the increased fares "are necessary so that travel thereunder may make a fair contribution toward [the railroad's] indirect costs and return on investment."

(4) Whether the district court erred in holding that the Commission, in fixing the fares here involved, made an improper comparison with fares previously established for the Chicago and North Western Railway Company.

STATEMENT

In February 1955, the Chicago, Milwaukee, St. Paul and Pacific Railroad (hereinafter "the Milwaukee" or "the railroad") filed with the Commission a petition under sections 13 (3) and (4) of the Act, for

an investigation to determine whether the Milwaukee's existing intrastate fares within the Chicago suburban area, made or imposed under authority of the Illinois Commerce Commission (hereinafter "the state commission") were causing unjust discrimination against interstate commerce, and to determine what fares, if any, should be established in order to remove any such discrimination found to exist.[1] The petition alleged that in July 1952, the Milwaukee applied to the state commission for authority to increase such fares, and that in November 1954 the state commission denied the relief sought, with the result that the railroad was required to perform transportation of passengers within the Chicago suburban area at fares which resulted in an out-of-pocket loss of more than $700,000 per year, causing unjust and unlawful discrimination against interstate commerce.

Following a hearing participated in by the railroad, the state commission, and an association of commuter passengers, the hearing examiner issued his report finding that the existing fares were causing unlawful discrimination, and proposing fare increases in order to remove it. Upon consideration of exceptions filed by the State and the association, and the railroad's reply, the Commission, on November 21, 1955, issued its report, 297 I. C. C. 353.

The Commission's formal findings, set forth in its report (pp. 359–360), are that (1) the railroad's present suburban fares do not produce sufficient revenue

[1] The proceeding is entitled No. 31742, *Chicago Intrastate Suburban Fares of Milwaukee Railroad.*

to cover the out-of-pocket cost of the service, and thus make no contribution toward its indirect costs or to a return on investment;[2] (2) the intrastate suburban fares cause and, unless increased to the extent prescribed, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce; (3) such discrimination can and should be removed by establishing for such intrastate travel fares no lower than the bases prescribed (set forth in an appendix to the report, the increases averaging about 21%); (4) the prescribed fares will be just and reasonable, will produce substantial additional revenue, and are necessary so that travel thereunder may make a fair contribution toward the railroad's indirect costs and return on investment, and to enable it to provide adequate and efficient service; (5) the railroad's interstate suburban fares on the same bases prescribed for intrastate suburban fares will be just and reasonable.

On the date the report was issued, November 21, 1955, the Commission entered an order in other proceedings[3] authorizing similar increases in the railroad's interstate suburban fares between Chicago Union Station and two Wisconsin points (Zenda and

[2] The Commission had already found (p. 358) that the out-of-pocket cost of the suburban passenger service exceeded by $306,038 the total revenues from that service; also that the prescribed fare increases would produce about $383,000 in increased revenues, which would eliminate the out-of-pocket deficit and result in a contribution of approximately $77,000 per year to indirect costs and taxes.

[3] Nos. 26550 and 11703, involving the Milwaukee's interstate fares.

Walworth) located within the Chicago suburban area. It did not then order the intrastate fares increased, but on March 2, 1956, the state commission having refused to permit the increases, the Commission entered an order directing the railroad to establish the prescribed intrastate fares by a certain date. Petitions for reconsideration were denied on May 4, 1956, and this suit followed.

THE QUESTIONS ARE SUBSTANTIAL

1. The district court annulled the Commission's order increasing the intrastate fares for the reason, among others, that certain evidence presented by the railroad to the Commission and acted on by it had not first been presented to the state commission. That evidence was in the form of exhibits which included in the out-of-pocket cost of performing the suburban service data as to depreciation of locomotives and coaches used in that service, and figures as to maintenance of facilities, such as roadbed, etc. The district court said that "If different evidence is to be offered or a different basis of fares is to be urged before the interstate commission, the state commission should have been given a chance to fix fares on the same evidence and the same basis."

This holding by the district court makes it a condition precedent to any action by the Commission under section 13 (4) that the petitioning railroad must first have presented to the state commission for its consideration the identical evidence presented to the Interstate Commerce Commission. If the district court's holding is permitted to stand, its order re-

manding the case to the Interstate Commerce Commission "for further proceedings not inconsistent with the opinion" will effectively tie the hands of the Commission and make impossible any further action by it except to refer the case again to the state commission. This portion of the decision below is clearly erroneous. This Court and the lower Federal courts have held consistently that the jurisdiction and authority of the Interstate Commerce Commission to increase intrastate rates or fares in order to remove unlawful discrimination against interstate commerce is not affected by the pendency of state commission proceedings or by anything that may be done or not done in such proceedings; also that the Commission has the power under section 13 (4) to order an increase in intrastate rates or fares to remove such discrimination even if the affected carrier has not first requested the state commission to allow such increases. *Florida* v. *United States*, 282 U. S. 194, 210; *State of Illinois* v. *United States*, 101 F. Supp. 36, 40, 47, aff'd, 342 U. S. 930, reh. denied, 343 U. S. 911; *North Carolina* v. *United States*, 128 F. Supp. 718, aff'd, 350 U. S. 805.

2. In annulling the Commission's order increasing the intrastate suburban fares, the district court also set aside and enjoined enforcement of another order of the Commission which increased the *interstate* fares between Chicago and two Wisconsin points suburban to Chicago. These interstate fares not being involved in the intrastate proceeding under section 13 (4) which was the subject-matter of the suit, the

United States and the Commission assumed that they (the interstate fares) must have been inadvertently included in the court's injunction decree. So assuming, they filed a motion to correct the judgment in this respect, also to correct the erroneous holding discussed in the preceding section hereof. The court denied the motion on July 31, 1956, leaving in effect its judgment annulling the increases in both interstate and intrastate fares.

Whether interstate fare increases, as well as intrastate fare increases, may be set aside and enjoined in a suit such as this, where only intrastate increases under section 13 (4) are involved, is a question of substantial importance to the Commission in its administration of the statute, and should be resolved by this Court.

3. The district court held that the Commission's order was invalid also because of the lack of a finding "as to what contribution from the intrastate suburban traffic would constitute a fair proportion of the railroad's total income." And the district court added that "Nor does the commission find that the revenue produced by the intrastate rates proposed by it will constitute not more than a fair proportion of respondent's total income, which finding was held sufficient in *King* v. *United States*, 344 U. S. 254, at 275" (App. A, *infra*, p. 17). We contend that the court below misapplied this Court's decision in the *King* case.

In the *King* case, this Court held that an order issued under section 13 (4) is not deficient for lack of "findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's

total income," where other appropriate findings are made. The alternate findings found adequate in the *King* case were that the intrastate rates there involved "are abnormally low and are not contributing their fair share to the revenues required * * * to render adequate and efficient service and to operate profitably," and that the proposed increases in those rates "will substantially increase respondents' revenues therefrom, and will constitute not more than a fair proportion of respondents' total income." 344 U. S., at 275.

In the instant case, the corresponding findings of the Commission are that the higher fares which it prescribed would eliminate an annual (based upon 1954 traffic) out-of-pocket loss of $306,000 on the suburban traffic and result in a contribution of about $77,000 annually to indirect costs and taxes, and that such increased fares "are necessary so that the travel thereunder may make a fair contribution toward respondents' indirect costs and return on investment," etc.

The Commission's finding that the higher fares which it prescribed "are necessary" to produce a "fair contribution" is the equivalent of the finding approved in the *King* case that the increased rates there involved would "constitute not more than a fair proportion of [the railroads'] total income." Clearly, a finding that specific fares are "necessary" to produce a fair proportion negatives the notion that they will do more than that.

The district court found the same finding of the Commission to be further deficient in that it is phrased in terms of "a fair contribution toward respondents'

indirect costs and return on investment" rather than as "a fair proportion of respondents' *total income*," the language of the finding sustained in the *King* case.[4] To the contrary, we submit that there is no practical distinction between a fair contribution (over and above direct or out-of-pocket costs) to "indirect costs and return on investment" and a fair proportion of "total income." Moreover, the finding criticized by the court below is substantially the same as the finding said to be lacking in *North Carolina* v. *United States*, 325 U. S. 507, 520, that the rate there in issue "did not contribute its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property directed to the transportation service."

In view of the continuing size and prevalence of deficits in railroad passenger operations,[5] it is important to eliminate uncertainty as to the requirements of Section 13 of the Interstate Commerce Act.

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[4] In the instant case, the court below stated flatly that "A fair proportion of a carrier's total income is not the same as a contribution to indirect costs and return on investment."

[5] In Docket No. 31954, the Commission recently instituted a general investigation concerning the deficit from passenger-train service and allied services performed in passenger-train operations by railroads subject to the jurisdiction of this Commission; the railroad passenger revenues, operating expenses and other income items relating to net railway operating income; the rate of return upon investment in road equipment property which is used in such service; the rules of this Commission governing the separation of operating expenses, railway taxes, equipment rents and joint facility rents between freight service and passenger service; and possible ways and means of reducing and eliminating the railroad passenger-train deficit which has been incurred in recent years.

4. The court below also held that it was improper for the Commission to base its finding that the higher intrastate fares would be just and reasonable upon a comparison with the suburban fares of the Chicago & North Western Railway Company without proof that operating conditions of the two carriers were comparable. We believe that the court misread the Commission's report. The Commission has held frequently that for rate comparisons on a revenue basis (e. g., per ton-mile or car-mile) to be valid it must appear that transportation conditions are similar for the compared traffic. See, e. g., *Newport News Shipbuilding & Drydock Co.* v. *D. & R. G. W. R. Co.*, 284 I. C. C. 674. In the instant case, the Commission made no comparison of rates in terms of the revenue which they would produce. The Commission did find that "there is a 'strong similarity' between the suburban territory served by [Milwaukee] and that served by the North Western, the two sets of fares, as approved by this and the Illinois commission, having formerly been on a parity." Thereupon, the Commission used this comparison of service territories and historic rate parity as the basis for concluding that fares higher than those prescribed by the Commission (and which Milwaukee sought), by discouraging travel, would not result in a substantial increase in Milwaukee's revenues (App. A. *infra*, p. 16). We submit that the use of such a comparison for this purpose clearly was proper, even without a showing of comparable operating conditions.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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OCTOBER 1956.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 56 C. 681

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION, PLAINTIFFS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEFENDANTS

June 14, 1956

Before ELMER J. SCHNACKENBERG, Judge of the United States Court of Appeals for the Seventh Circuit, and PHILIP J. SULLIVAN and WALTER J. LA BUY, District Judges.

SCHNACKENBERG, *Circuit Judge.* This is an action to set aside and enjoin the enforcement of an order[1] of the Interstate Commerce Commission[2] authorizing the Chicago, Milwaukee, St. Paul and Pacific Railroad Company[3] to put into effect intrastate rates or fares for Chicago area suburban service higher than

[1] Entered March 2, 1956, based on report dated November 21, 1955 (297 I. C. C. 353).

[2] Herein sometimes referred to as the "interstate commission."

[3] Herein sometimes referred to as the "Milwaukee Road."

those authorized by the Illinois Commerce Commission.[4]

The Milwaukee Road by petition to the interstate commission requested an investigation under § 13 (4) of the Interstate Commerce act[5] to determine whether intrastate suburban passenger rates approved by the state commission unjustly discriminated against interstate commerce. It asked that, if found so to discriminate, the rates be adjusted so as to remove the discrimination. The order of the interstate commission which we now consider is based upon its report of November 21, 1955, in which it refers to the Milwaukee Road as "respondent" and Milwaukee Road Commuters' Association as "protestant."

This report states that "on an out-of-pocket basis respondent shows a deficit of $724,511, while protestant shows an income of $9,701. For expenses other than the Union Station, protestant's lower figures are accounted for by the elimination of any allowance for depreciation and of certain accounts for maintenance of way not included in respondent's study before the Illinois commission." The report quotes the dollar amounts of depreciation which the interstate commission considers proper direct charges to the service and hence are out-of-pocket costs. It similarly considers certain maintenance of way expenses.

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[4] Herein sometimes referred to as the "state commission."

[5] 49 U. S. C. A., § 13 (4). "Whenever * * * the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes * * * any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination."

The report points out that these depreciation and maintenance of way charges were not included in respondent's showing before the Illinois commission, but were included in its showing before the interstate commission. The report states that respondent's explanation for the prior omission was "its impression that, even without them, it had shown a considerable deficit from this service." The report adds: "This explains but does not excuse its incomplete showing before the Illinois commission."

The report finds:

> "Summarizing, the total revenues from the passenger-carrying portion of the suburban service were $1,799,140, the out-of-pocket cost, not including nonpayroll taxes or return, was $2,269,404, and the credit for nonrevenue passengers $164,226, resulting in a total out-of-pocket deficit of $306,038.
>
> If the fares were increased an average of 20 percent as in *Computation and Multiple Fares, Illinois and Wisconsin,*[*] *supra,* plus the additional increase to a minimum of 25 cents per trip, the increased revenue based on the 1954 movement would be about $383,000, which would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes, of approximately $77,000 annually."

The report also sets forth as follows:

> "Protestant shows that the proposed fares are somewhat higher than certain of the fares of the dieselized lines of the Burlington and the Chicago, Rock Island and Pacific Railroad Company in the Chicago area, while respondent shows that they are somewhat lower than certain fares which the commissions have approved for the electric lines of the Illinois Central Railroad Company and the Chicago South Shore

[*] 288 I. C. C. 15.

and South Bend Railroad in the Chicago area. However, we think that the comparison with the fares of the North Western is more persuasive, as, in the words of respondent's traffic witness, there is 'a strong similarity' between the suburban territory served by it and that served by the North Western, the two sets of fares, as approved by this and the Illinois commission, having formerly been on a parity."

Referring to the net railway operating income of respondent in 1954, the report states that it earned "from its freight operations $37,393,050, and suffered a deficit from its passenger operations of $22,824,532, resulting in a net railway operating income of $14,568,518. To the extent that this suburban service fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs, it increases respondent's passenger deficit and results in an undue burden upon its freight operations, State and interstate."

The report also makes the following findings:

"1. That respondent's present suburban fares do not produce sufficient revenue to cover the out-of-pocket cost of the service and thus make no contribution toward its indirect costs nor to a return on investment.

2. That respondent's present intrastate suburban fares, made or imposed by authority of the State of Illinois, cause and, unless increased to the extent herein set forth, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 (4) of the Inter-state Commerce Act.

3. That such undue, unreasonable, and unjust discrimination can and should be removed by establishing for such intrastate travel fares no lower than the bases set forth as prescribed in the appendix hereto.

4. That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service.

5. That respondent's interstate suburban fares on the same basis as herein prescribed for intrastate application will be just and reasonable for the future."

1: While the interstate commission finds that the intrastate rates which it approves "would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes, of approximately $77,000, annually" and that those fares "will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment;" at no place does the commission make any findings as to what contribution from the intrastate suburban traffic would constitute a fair proportion of the railroad's total income. In fact the interstate commission makes no finding as to what the Milwaukee Road's total income was for the year in question, and likewise no finding as to what would be a fair proportionate share of total income of the road which the intrastate traffic now under consideration should contribute. These data are not found by the interstate commission either as specific findings in dollars or in any other form. Nor does the commission find that the revenue produced by the intrastate rates proposed by it will constitute not more than a fair proportion of respondent's total income, which finding was held insufficient in *King* v. *United States*, 324 U. S. 254, at 275.

In *North Carolina* v. *United States*, 325 U. S. 507, at 516, the court said:

> "But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intrastate passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service. The Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income."

The report which we are considering asserts that intrastate traffic should make a larger contribution, but there is no finding as to what contribution would be a fair proportion of the railroad's total income.

The rule is established that the interstate commission must make basic findings required to support its order. *Florida* v. *United States*, 282 U. S. 194, at 215; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, at 86.

An order of the interstate commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, at 462; *United States* v. *Chicago, M., St. Paul & P. R. Co.*, 294 U. S. 499, at 504.

In *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, at 86, the court said:

> "The Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity

> of the order. Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this."

See also 15 C. J. S. 534.

The report of the interstate commission completely ignores that, in determining intrastate fares, a controlling inquiry is what contribution from the intrastate traffic would constitute a fair proportion of the railroad's income. In the case at bar it is not sufficient that the interstate commission found that the prescribed rates will "make a fair contribution toward respondent's indirect costs and return on investment." A fair proportion of a carrier's total income is not the same as a contribution to indirect costs and return on investment. Paying all of the costs of suburban service and, in addition, making a contribution to the other costs of the railroad, may well be more than contributing a fair proportion of Milwaukee Road's total income. Nor is it sufficient that the interstate commission found that to the extent that the suburban service "fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs," it discriminates against its freight operations. This finding is no substitute for one as to what it should contribute as a fair proportionate share of the railroad's total income. Without the latter finding the order of the interstate commission cannot stand. This is not inconsistent with *State of Illinois* v. *United States*, 101 F. Supp. 36, affirmed 342 U. S. 930. There was in that case a specific subsidiary finding [281 I. C. C. 552].

> "The fares approved herein will yield a return after taxes of about 3.2 percent, and an

> average increase of about 20 percent or $1,300,000 per annum, which *we find to be the approximate measure of the revenue discrimination* against interstate commerce resulting from petitioner's present multiple and commutation fares." [Emphasis added.]

In that case the commission also found "That in connection with its minimum and round-trip suburban fares, petitioner has not shown any person-locality or *revenue discrimination against interstate commerce.*" (Finding 2, 281 I. C. C. 552.) [Emphasis added.]

2. Even under the rationale of the interstate commission, it is somewhat difficult to ascertain from its report the precise obligation of the suburban service to which the intrastate fares, as fixed thereby, are to contribute after meeting the out-of-pocket deficit.

The report at one place says that if the fares were increased an average of 20 per cent,[7] plus an additional increase to a minimum of 25 cents per trip, the increased revenue based on the year 1954 would eliminate the out-of-pocket deficit and result in *a contribution to indirect costs and taxes*, of approximately $77,000 annually. Based upon the same year, the report at another place says that to the extent that this service fails to meet the out-of-pocket cost and make *all the contribution that it reasonably can to respondent's indirect costs*, it increases the latter's passenger deficit and results in an undue burden on its freight operations. In finding 4 the report states that the prescribed fares are necessary so that the travel thereunder may make a *fair contribution toward respondent's indirect costs and return on invest-*

[7] Actually they were increased about 21 percent according to the counsel for the Milwaukee Road, or 28 percent according to counsel for the protestants.

ment. If a *contribution* is to be made toward the satisfaction of an obligation, it is obvious that the extent of the obligation must be fixed; otherwise no one can know what the size of the contribution should be. We are here speaking of an involuntary contribution. The limitless requirements implicit in the parts just cited from the report are reminiscent of public fund raising campaigns which used as their slogan "Give till it hurts". That was a legitimate civic or patriotic appeal. However, we are here confronted with the imposition of an involuntary contribution being exacted by legal means. To be sustained, it must be based upon a finding of the extent of the obligation. It cannot be supported by a vague reference to an unascertained amount of "indirect costs and taxes" or what the suburban service can reasonably contribute to the Milwaukee Road's "indirect costs," or "a fair contribution toward respondent's indirect costs and return on investment."

3. We are confronted with the question of whether the evidence before the interstate commission supports its finding that the intrastate fares which it has prescribed will be just and reasonable for the future. This finding rests on an averment in the report that the comparison with the fares of the Chicago and North Western Railway Company is more persuasive, as, in the words of respondent's traffic witness, "there is a strong similarity between the suburban territory served by the Milwaukee Road and that served by the North Western. * * *."

The evidence of J. K. Pain, the traffic witness referred to, does not support this averment. He actually said that he believed there is a *difference* in the operation of the two roads and that he was not prepared on the subject of cost or expense, which was a little bit out of his line. He added that an

endeavor was made to figure an increase on an equitable basis "that would recover our losses * * * and would be fair to the suburban passenger." When asked if Milwaukee Road's territory was "pretty similar" to North Western's, Mr. Pain asked, "Do you mean geographically or in operation or what?" When the examiner said that he was talking about the nature of the suburban community, the witness answered "Yes, you could probably say there is a strong similarity." Thereupon the attorney for the Milwaukee Road stated "we do not offer these North Western fares as a criteria (*sic*) as to what our fares should be."

There was no evidence offered showing similarity of equipment, service or operating conditions. On the other hand, the record shows that the lines are not comparable. The suburban North Western rates are based upon an operation of 72 steam locomotives and only 3 diesel locomotives as against a complete diesel operation on the Milwaukee. A comparison of the cost of the Milwaukee suburban operation under steam and diesel locomotives shows that the diesel operation costs less than steam. That a comparison cannot be properly made between a steam operation and a diesel operation has been recognized by the interstate commission in a case in which North Western Chicago suburban fares were raised to their present level, and the commission stated, in referring to the analysis upon which its order was based, "The above analysis relates to an existing suburban operation for the year 1951 and obviously does not contemplate the cost of some other suburban operation such as might be encountered with diesel engines, gallery-type cars and Budd Cars."[8] Moreover, the interstate commission

[8] 288 I. C. C. 15, at 23.

has taken note of the fact that the Milwaukee division of the North Western carries no freight whatsoever and that the entire cost there must be borne by passenger-traffic. *Commutation Fares between Chicago and Wisconsin*, 279 I. C. C. 773, 777–778.

The Milwaukee suburban operation is alleged to be much more comparable to the suburban operation of the Burlington and Rock Island than it is to the North Western operation. Those are the other two Chicago railroads using diesel locomotives in their suburban service. The commission, nevertheless, ignores that comparison, and holds, in effect, that the Illinois commission was wrong in giving weight to it. Instead, the proposed report applies the North Western formula without any evidence in the record of similarity of conditions necessary to make that formula applicable. The use of the North Western formula was not justified. Without sufficient evidence of comparability in operation, there is no ground for fixing the Milwaukee Road's fares at the North Western level, or for finding that the resulting fares are just and reasonable.

We hold that the evidence does not support the finding of the interstate commission that the prescribed rates are just and reasonable. Nor can a carrier justify unreasonably high rates on intrastate business on the ground that only in that way is it able to meet losses on its interstate business. *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, at 483; *Smyth* v. *Ames*, 169 U. S. 466 at 541, 42 L. Ed., 819 at 847.

4. In the state commission proceeding, which was initiated by the Milwaukee Road, the latter showed in its exhibits that the depreciation of locomotives and coaches was not included in the out-of-pocket cost. Likewise, in its exhibits in that case it did not include in out-of-pocket expense certain maintenance of way

accounts involving maintenance of facilities, such as roadbed, etc. The comments in the interstate commission's report, in regard to these items, show that they were by the Milwaukee Road deliberately removed from the consideration of the state commission. It follows that facts presented by Milwaukee Road to and relied upon by the interstate commission to support its finding as to an out-of-pocket suburban deficit, were not presented to nor relied on by the Milwaukee Road in the state commission proceeding. If different evidence is to be offered or a different basis of fares is to be urged before the interstate commission, the state commission should have been given a chance to fix fares on the same evidence and the same basis.

In *North Carolina* v. *United States*, 325 U. S. 507, at 511, the court said:

> "Since the enactment of § 13 (4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate."

Where a railroad seeks the fixing of higher intrastate rates by the interstate commission after failing in such endeavor before a state commission, § 13 (4) does not contemplate that the state commission is to be considered only a way station in a journey to the interstate commission. In the instant case justification for the exercise of the federal power to nullify state rates does not clearly appear from the record before us.

Plaintiffs have made various other charges against the order of the interstate commission, which we do

not find it necessary to decide, in view of the fact that our views herein expressed sufficiently decide the case now before us.

In this type of case we are not required, under rule 52 (a), Federal Rules of Civil Procedure, or otherwise, to make findings of fact. *Despatch Shops* v. *Railroad Retirement Board*, 60 F. Supp. 106, affirmed 154 F. 2d 417; *In Re Chicago, M. St. P. & P. R. Co.*; *Abrams* v. *Scandrett*, 138 F. 2d 433.

For the reasons hereinbefore set forth, the order of the Interstate Comerce Commission is set aside and the subject matter thereof is remanded to that commission for further proceedings not inconsistent herewith. A permanent injunction will issue forthwith, as prayed.

A true copy:

Teste:

_____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES OF AMERICA

DISTRICT COURT OF UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 56 C 681

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION, PLAINTIFFS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEFENDANTS

Decree

This case has been heard on the complaint; the answers of defendants thereto; the record before the Interstate Commerce Commission in the proceeding known as Docket No. 31742 of that commission, and the arguments of counsel for plaintiffs and defendants, and the court being fully advised in the premises, orders, adjudges and decrees:

1. The order of the Interstate Commerce Commission, dated March 2, 1956 (and the prior report and order dated November 21, 1955, upon which the order of March 2, 1956, was based) entered in proceeding Docket No. 31742, are beyond the power, and are an abuse of

authority, of the Interstate Commerce Commission.

2. Said report and orders are not supported by the findings of, nor by the evidence before, the Interstate Commerce Commission in the proceeding, commission's Docket No. 31742, in which they were entered.

3. Said report and orders of the Interstate Commerce Commission are void, and are set aside; and the subject matter is remanded to said Commission for further proceedings not inconsistent with the opinion this day filed herein.

4. The Interstate Commerce Commission is permanently enjoined from enforcing said report and orders, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company (herein called "the Milwaukee Road") is permanently enjoined from continuing to give effect to the fares prescribed therein.

5. The Milwaukee Road shall return forthwith to the persons from whom collected all monies received by it as excess fares under the order of this court dated April 18, 1956.

6. Judgment is entered in favor of Illinois Commerce Commission and Milwaukee Road Commuters' Association, and against the Milwaukee Road for costs.

(S) ELMER J. SCHNACKENBERG,
United States Circuit Judge.

(S) PHILIP L. SULLIVAN,
United States District Judge.

(S) WALTER J. LABUY,
United States District Judge.

Dated: June 14, 1956.

APPENDIX C

The pertinent provisions of the Interstate Commerce Act (49 U. S. C.) involved in this case are as follows:

Section 13 (3):

> Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

Section 13 (4):

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

U. S. GOVERNMENT PRINTING OFFICE: 1966